IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1238

ANTHONY J. LEVATINO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES (Continued)

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The Petitioner, ANTHONY J. LEVATINO, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, entered on November 16, 1977, and Motion for Rehearing En Banc denied on December 12, 1977, and Motion for Stay of Mandate denied January 30, 1978.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, dated November 16, 1977, has yet

to be reported in the official reports, but is appended to this Petition in the Appendix at Page 1a. The order of the United States Court of Appeals, Fifth Circuit, dated December 12, 1977, denying a motion for rehearing En Banc has yet to be reported in the official reporters, but is appended to this Petition in the Appendix at Page 6a.

The order of the United States Court of Appeals, Fifth Circuit, dated January 30, 1978 denying the Motion for Stay of Mandate has yet to be reported in the official reporters, but is appended to this Petition in the Appendix at Page 7a.

JURISDICTION

The decision of the United States Court of Appeals, Fifth Circuit, was made and entered on the 16th day of November, 1977. The order denying a Petition for Rehearing En Banc, United States Court of Appeals, Fifth Circuit, was made and entered on the 12th day of December, 1977. See Appendix, at Pages 1a through 6a.

Petitioner, ANTHONY J. LEVATINO, relied on his attorney of record before the United States Court of Appeals, Fifth Circuit, to advise him on his rights in regards to Petition for Writ of Certiorari to be filed with the U. S. Supreme Court.

The Attorney of Record, Robert J. Buonauro, failed to properly advise the Petitioner of his rights under the Supreme Court Rules and the Attorney of Record,

Robert J. Buonauro, informed the Petitioner that he had thirty (30) days from the rendition of the order on his Motion to Stay Issuance of Mandate in which to file his Petition for Writ of Certiorari to the Supreme Court of the United States. The attorney of record before the United States Court of Appeals, Fifth Circuit was in error in his belief that the thirty (30) day time period for filing Writ of Certiorari ran from the rendition of the order on the Motion to Stay the Issuance of the Mandate.

It appears from the record that no Petition for Extension of Time for filing Petition for Writ of Certiorari was filed by the Petitioner prior to this Petition and that more than thirty (30) days have elapsed since the rendition of the judgment by the United States Court of Appeals, Fifth Circuit on December 12, 1977.

The arrest and conviction of the Petitioner, ANTHONY J. LEVATINO, raises grave constitutional questions concerning the Fifth and Fourteenth Amendments to the Constitution of the United States which this Court should consider. The Petitioner as a layman with no knowledge of the details of the requirements of filing a Petition for Writ of Certiorari relied solely and justifiably so on the advice of his retained private counsel knowledgeable of criminal matters. Appended to this Petition, Appendix Pages 8a through 9a is the Affidavit of the Petitioner in support of this late filing. The jurisdiction of this Court is invoked under *28 U.S.C., §1254(1).*

QUESTION PRESENTED

Petitioner, ANTHONY J. LEVATINO, was sentenced to two years imprisonment by the Honorable John Reed, Judge of the District Court, Middle District of Florida. The Petitioner, ANTHONY J. LEVATINO, was found guilty by a jury for violation of *Title 18, U.S. Code, §473*, charging Petitioner, ANTHONY J. LEVATINO, with the conspiracy to transfer and deliver counterfeit United States obligations and charging the Petitioner with the transfer and delivery of ten (10) counterfeit $5,000.00 treasury notes to the Pan American Bank of Altamonte Springs, Florida in violation of *Title 18, U.S. Code §473*. That from said conviction the Petitioner, ANTHONY J. LEVATINO, appealed to the United States Court of Appeals, Fifth Circuit. The United States Court of Appeals, Fifth Circuit, rendered its decision on November 16, 1977 affirming the District Court Judgment.

Before the trial was held the Petitioner, ANTHONY J. LEVATINO, filed a Motion to Suppress illegally obtained evidence which consisted of statements made by the Petitioner after having been given partial "Miranda Rights". That after having been read certain rights by agents of the federal government, the Petitioner requested to speak to an attorney wherein the federal agent replied, "that an attorney would only tell you not to talk with us", and continued with the questions to the Petitioner.

The question presented to this Court is: whether the Petitioner's constitutional rights were violated by the denial of his Motion to Suppress illegally obtained statements made by the Petitioner, ANTHONY J. LEVATINO, after his request to speak to an attorney.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution.

2. The Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On February 21, 1976, a Complaint was filed before the United States Magistrate at Orlando, Orange County, Florida, charging Petitioner, ANTHONY J. LEVATINO, with a violation of *Title 18, U.S. Code, §473*. On or about April 29, 1976, Appellant was indicted in a two count indictment, first count charging Defendant with conspiracy to transfer and deliver counterfeit United States obligations, the second count charging Appellant with the transfer and delivery of ten (10) counterfeit $5,000.00 treasury notes to the Pan American Bank of Altamonte Springs, Florida, in violation of Title 18, U.S. Code, §473. That pursuant to said indictment a jury trial was held in the United States District Court, Middle District of Florida and Petitioner, ANTHONY J. LEVATINO, was found guilty of both counts.

As a result of said conviction the Petitioner, ANTHONY J. LEVATINO, timely appealed to the United States Court of Appeals, Fifth Circuit. That on November 16, 1977, the United States Court of Appeals, Fifth Circuit, rendered its decision affirming the trial court's conviction.

The Petitioner, ANTHONY J. LEVATINO, timely filed a Petition for Rehearing En Banc which was denied on December 12, 1977, by the United States Court of Appeals, Fifth Circuit. The Petitioner, ANTHONY J. LEVATINO, filed in the United States Court of Appeals, Fifth Circuit, a Motion for Stay of Issuance of Mandate which was denied on January 30, 1978.

On February 21, 1976, the Petitioner was apprehended at the Orlando Airport and taken to a security office at the terminal. The Petitioner was taken into custody by agents of the federal government, the Secret Service, and was a suspect involving counterfeit treasury notes. When arriving at the security office the agent of the Secret Service advised the Petitioner that they were conducting an official investigation pertaining to the passing of ten (10) United States treasury notes at the Pan American Bank Building in Altamonte Springs, Florida. That at that time the appellant was advised of his rights verbally according to the federal agents. That during the interview, the Petitioner stated to the agent that he thought he ought to talk to a lawyer. That the agent failed to stop the questioning at that point but made the comment that "your attorney would tell you that you shouldn't talk to us at all". At this point the Petitioner continued the conversation with the agent in reference to the fact that he did not know that the notes were counterfeit and explained that he did not know where the notes came from and had no knowledge of a co-defendant by the name of Michael Ready.

The rights orally given to the Petitioner were that he had the right to remain silent, that anything he said

could be used against him in Court or other proceedings, that he had a right to have an attorney present with him during any questions that if he could not afford an attorney he had the right to have an attorney appointed for him at no expense. That after leaving the airport security office the Petitioner was taken to the Secret Service office at the Federal Building at Orlando, Florida, where he was provided with a written form advising the Defendant of his Miranda warning which after Petitioner read same refused to waive his rights as outlined in the consent form. At the suppression hearing the Secret Service agents could not confirm or deny that Petitioner was promised anything if he agreed to cooperate with the agents, i.e., that is in submitting to an interview.

Prior to trial the Petitioner filed a motion to suppress the statements made by him at the airport security office and prior to his refusal to sign the waiver of his rights as outlined in the consent form provided by the Secret Service agents. The trial Court, denied the motion to suppress and allowed the evidence to be used against the Defendant.

REASON FOR GRANTING THE WRIT

The decisions rendered by the United States Court of Appeals for the Fifth Circuit and of the United States District Court, Middle District of Florida in Petitioner's case have decided important questions of law which should be settled in this Court. The Court of Appeals for the Fifth Circuit was faced with the issue of whether or not the trial court erred in denying the Appellant's motion to suppress statements obtained

from the Appellant by agents of the United States secret service on February 21, 1976. On this point, the United States Court of Appeals for the Fifth Circuit rendered the following decision holding:

> "The record reflects that the Appellant was twice specifically warned of his rights, that he acknowledged that he understood those rights, and that he willingly spoke to the agents. In the context of the entire situation, the Miranda warnings were adequate and the Government's burden of showing voluntariness of the statements by a preponderance of the evidence was met."

The same point of law was involved in the case of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

At the time the Petitioner, ANTHONY J. LEVATINO, was advised orally of his Miranda warnings, the government's agents, the Secret Service, failed to advise the Petitioner, ANTHONY J. LEVATINO, if at any stage of the proceeding he indicated he wished to consult with an attorney before speaking there could be no questioning.

The same point of law was involved in the case of *Frazier v. Cupp*, 349 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), where the defendant was convicted of second degree murder. Following his arrest on September 24, 1964, he was given a somewhat abbreviated description of his constitutional rights in that he was told he could have an attorney, if he wanted one, and that anything he said could be used against

him. He was confronted with evidence in that another had confessed to the crime. Furthermore, the officers showed sympathy to the defendant by sympathetically suggesting the victim had started a fight by making homosexual advances to the defendant. Shortly thereafter, the defendant confessed to the crime. However, during the course of the confession he stated, "I think I had better get a lawyer before I talk anymore". The officer replied, "You can't be in any more trouble than you are now", and the questioning session proceeded.

The defendant *Frazier* argued that his statement should be suppressed under the decision of *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), in that the police should have immediately stopped the questioning and obtained counsel for the defendant. This court held ". . . We might agree were Miranda applicable to this case, for in Miranda the Court held that 'if . . . a suspect indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning.' But Miranda did not apply to this case."

The same point of law was involved in the case of *Brewer v. Williams*, ___ U.S. ___, 97 S.Ct. ___, 51 L.Ed.2d 424 (1977), wherein the Supreme Court ruled that a conviction for murder was properly reversed where incriminating statements were improperly obtained from the defendant, which statements led to discovery of the victim's body. The Court based its opinion on the right to assistance of counsel and furthermore, that there was no reasonable basis in the record to find that the defendant had waived his right to

counsel. During the course of the trip, Brewer indicated to the transporting officers that he was going to tell the whole story after he conferred with his attorney. Furthermore, the defendant had the officers stop on three separate occasions in route, first, to recover the victim's shoes, then a blanket and finally, the victim's body. Although the defendant was advised by his attorney not to discuss the case with the transporting officers and again the defendant's attorney advised the officers not to interview the defendant, he nevertheless cooperated with the officers and finally led them to recovery of the victim's body. The point is that the defendant had effective assistance of counsel, was effectively advised, but yet voluntarily cooperated. The Court held that the record indicated that the defendant had been informed of and appeared to understand his right to counsel but waiver requires not merely comprehension, but relinquishment and the defendant's consistent reliance upon advice of counsel in dealing with the authorities refutes any suggestions that he waive his right.

The same point of law was involved in the case of *United States v. Blair*, 470 F.2d 331 (Fifth Circuit 1972). Here the defendant was arrested at the United States Post Office and taken to a workshop area in the Post Office where he was advised of his rights by the arresting postal inspector. The defendant stated that he wanted representation by an attorney and that he wanted an attorney. Nevertheless, the officer persisted in questioning the defendant for more than an hour eliciting incriminating statements from him. The Court held that the language of the Supreme Court in *Miranda* could hardly have been more uncom-

promising. "If the accused indicates in any manner and at any state of the process, that he wishes to consult with an attorney before speaking, there can be no questioning. The right to counsel present at interrogation is indispensable to protection of the Fifth Amendment privilege. Any statement taken after the person invokes the privilege cannot be other than a product of compulsion, subtle or otherwise. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." The Government maintained that once the defendant was advised of his right to be free from self-incrimination and chose to talk thereafter, he knowingly and intelligently waived his Fifth Amendment privilege. The Court held that this argument flies in the face of the express language of Miranda. "A valid waiver will not be presumed simply from . . . the fact that a confession was in fact eventually obtained. . . . The record must show, or there must be an allegation and evidence which show, that the accused was offered counsel but intelligently and understandingly rejected the offer. Anything else is not a waiver."

The same point of law was involved in the case of *United States v. Johnson*, 558 F.2d 1225 (Fifth Circuit 1977). The defendant's conviction for possession of cocaine was reversed in that the prosecution witness improperly commented on the defendant's post-arrest silence. The testimony indicated that after the defendant was arrested and read her Miranda rights, she refused to sign a waiver of her rights or to cooperate. Although she stated that she had a logical explanation for the presence of the cocaine, she declined to elaborate on her explanation until she obtained legal

advice. Furthermore, the defendant affirmatively denied knowing the cocaine was in her suitcase.

In reaching its decision the Court considered the ultimate question as to whether the expression of the defendant to cooperate or to explain the circumstances of the presence of the cocaine in her suitcase was sufficient to transport the challenged testimony into statements made in waiver of the Miranda warnings. The Court first held that any of the statements made by the defendant were consistent with remaining silent as they are with prior knowledge of the presence of the cocaine. The Court stated, "Indeed, a politely expressed desire to remain silent may reflect defendant's caution in the face of an intimidating and inherently coercive situation. The Court ruled that the state of evidence makes it likely that the defendant's expressed desire to remain silent tipped the scales for the jury encouraging the jury to believe that the defense was fabricated after arrest. The Court further ruled that continued questioning was prohibited after the defendant indicated a desire to remain silent and have an opportunity to consult with an attorney. Several of the challenged statements were made after the officer's continued questioning. The Court did not specifically hold that the utterances constituted coerced confessions but did note the presence of illicit pressure and expressed concern that pressure necessitated the defendant's repeated assertions that she did not want to talk to the officers without consulting an attorney. Although this is a *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), type situation, the Court went to extreme lengths in pointing out that the defendant did not waiver her right to remain silent or to assistance of counsel although she

continued conversing with the interrogating officers after asking for an attorney.

It can be seen from the above argument that the decision of the United States Court of Appeals, Fifth Circuit, which the Petitioner seeks a writ of certiorari is in direct conflict with the above mentioned decision with the United States Court of Appeals, Fifth Circuit and the United States Supreme Court.

Because of the reasons already set forth it is the Petitioner's belief that the decision hereby sought to be reviewed is erroneous and the conflicting decisions of the United States Court of Appeals, Fifth Circuit and this Honorable Court, United States Supreme Court are correct and should be approved by the United States Supreme Court as controlling law.

CONCLUSION

WHEREFORE, for the reasons set forth above it is respectfully submitted that the Petitioner's Writ for Certiorari be granted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been furnished by mail to Wade H. McCree, Jr., Solicitor General of the United States; one copy to Robert A. Leventhal, Assistant United States Attorney; Clerk of the United States Court of Appeals for the Fifth Circuit, and to the Clerk of the United States District Court, Middle District of Florida, this ____ day of March, 1978.

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Attorneys for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5094
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ANTHONY J. LEVATINO,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

(November 16, 1977)

BEFORE GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

Appellant was convicted by a jury on two counts, conspiracy to sell counterfeit United States Treasury Notes and delivery of such counterfeit notes, in viola-

* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

tion of 18 U.S.C. §§371 and 473. He was sentenced to two concurrent terms of two years. We affirm.

Appellant raises a number of issues on appeal. His initial contention is that his conviction was illegally obtained by the use of statements given by him to agents of the United States Secret Service. Appellant maintains that the agents gave him inadequate *Miranda*[1] warnings, failed to supply him with counsel, and failed to bring him, without unnecessary delay, before a committing magistrate. The district court, following a hearing on the above allegations, denied appellant's motion to suppress. The court made specific findings, among which were that prior to any questioning there was probable cause to arrest, that the appellant was adequately advised of his *Miranda* rights, and that the appellant was not threatened, coerced, or made any promise of rewards. The trial court's findings on the motion to suppress must be accepted unless clearly erroneous. *United States v. Griffin*, 555 F.2d 1323 [No. 76-2553, July 18, 1977]; *United States v. James*, 528 F.2d 999, 1018 (5th Cir. 1976), *cert. den., reh. den.* 97 S.Ct. 1258 (1976). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 359, 68 S.Ct. 525, 92 L.Ed. 746 (1948). We have no such conviction. The record reflects that appellant was twice specifically warned of his rights, that he acknowledged that he understood those rights, and that he

1 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

willingly spoke to the agents.[2] In the context of the entire situation, the *Miranda* warnings were adequate and the government's burden of showing voluntariness of the statements by a preponderance of the evidence was met. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972); *United States v. Vasquez*, 534 F.2d 1142 (5th Cir. 1976); *United States v. Montos*, 421 F.2d 215 (5th Cir. 1970), *cert. denied* 90 S.Ct. 1262 (1970).

Appellant also maintains that he was not taken immediately before a magistrate,[3] and that although this point was not raised during pre-trial motions or during trial, this Court has discretion to consider it under the plain error rule. Even assuming, arguendo, that it may be considered, it does not amount to plain error. *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1966) and *United States v. Odom*, 526 F.2d 339 (5th Cir. 1976) cited by appellant, stand for the proposition that the delay must be unnecessary before it will render a statement inadmissible. The Court clearly recognized that certain circumstances may justify delay between arrest and arraignment. 526 F.2d at 343. In the instant case, appellant was first approached by federal agents at approximately 4:30 p.m. in a public airport. He was at the police station within approximately an hour, and was brought before a magistrate the same evening. Where the agents had probable cause to detain the appellant, and where the appellant had been adequately advised of his constitutional rights, the brief questioning at the airport and

2 *Brewer v. Williams*, ___ U.S. ___, 97 S.Ct. ___, 51 L.Ed.2d 424 (1977), cited by appellant, is distinguishable, as Brewer made his statements to the police officers after it had been agreed between the officers and Brewer's attorney that Brewer would not make any statements to the officers during the trip in question.

3 *See*, Rule 5(a), Federal Rules of Criminal Procedure; 18 U.S.C. §3501.

the difficulty in obtaining a magistrate on a Saturday night, do not constitute plain error.

Appellant next urges that the trial court erred in refusing to grant his motion for acquittal at the close of the government's case, in that the evidence was insufficient to send the case to the jury; that the government's evidence totally failed to prove the charge of conspiracy; and that the verdict was, therefore, contrary to law and to the weight of evidence. After careful examination of the record, it is our opinion that there was ample evidence to submit to the jury.[4] Furthermore, in reviewing the sufficiency of the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and making all credibility choices and inferences in support of the jury's verdict, *United States v. Black*, 497 F.2d 1039 (5th Cir. 1974); see also, *Gordon v. United States*, 438 F.2d 858, (5th Cir. 1971), it is clear that the jury could have concluded that the evidence did exclude every reasonable hypothesis but that of guilt. *United States v. Smith*, 493 F.2d 24 (5th Cir. 1974); *United States v. Warner*, 441 F.2d 821 (5th Cir. 1971), *cert. denied* 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971).

With regard to appellant's charge that the government failed to prove the conspiracy, even going so far as to assume error, it would be harmless under the concurrent sentence doctrine. *Barnes v. United States*,

4 For conviction it was necessary to prove that appellant knew that the Treasury notes in question were counterfeit and that he intended the notes to pass as genuine. It is clear that knowledge of an obligation's counterfeit nature may be established by circumstantial evidence and the inferences flowing therefrom. Paz v. United States, 387 F.2d 428, 430 (5th Cir. 1967).

412 U.S. 837, 848 & n. 16, 93 S.Ct. 2357, 3264 & n. 16, 37 L.Ed.2d 380, 387 & n. 16 (1973); *Hirabayashi v. United States*, 320 U.S. 81, 105, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943). *United States v. Works*, 526 F.2d 940, 948 (5th Cir. 1976).

Finally, appellant contends that he was deprived of a fair and impartial trial due to particular comments on the part of the judge. As there was no discernable prejudice to the appellant, we find these contentions to be meritless. *United States v. DeLaughter*, 453 F.2d 908 (5th Cir. 1972).

Judgment is affirmed.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

December 12, 1977

TO ALL PARTIES LISTED BELOW:

NO. 77-5094 — U.S.A. -vs- Anthony J. Levatino

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk
/s/ R. ADELINE BARNES
Deputy Clerk

cc: Mr. Robert J. Buonauro
Mr. Robert E. Leventhal

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5094

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ANTHONY J. LEVATINO,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ORDER:

The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

/s/ PETER T. FAY
UNITED STATES
CIRCUIT JUDGE

[Filed: Jan. 30, 1978]

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF ORANGE

BEFORE ME the undersigned authority on this day personally appeared, ANTHONY J. LEVATINO, who being by me this date duly sworn, deposes and says:

1. That I, ANTHONY J. LEVATINO, of Orange County, Florida, give the following statement concerning the matter of my Petition for Writ of Certiorari before the Supreme Court of the United States of America:

After my conviction of conspiracy to transfer and deliver counterfeit United States obligations and the transfer and delivery of ten (10) counterfeit Five Thousand and No/100 Dollars ($5,000.00) treasury notes to the Pan American Bank of Altamonte Springs, Florida, I contacted ROBERT J. BUONAURO about representation on my appeal.

That ROBERT J. BUONAURO, attorney, was recommended to me as being knowledgeable in criminal appellate matters. Mr. Buonauro and I came to an agreement as to fees and costs and Mr. Buonauro represented me throughout the proceedings in the United States Court of Appeals, Fifth Circuit.

2. After confirmation of my conviction in the United States Court of Appeals, Fifth Circuit, I was informed by Mr. Buonauro that he would file a Motion for Stay of Issuance of Mandate to the United States Court of Appeals, Fifth Circuit.

3. That after receiving the January 30, 1978 decision by the United States Court of Appeals, Fifth Circuit, denying the Stay of Issuance of the Mandate in the office of my attorney, Mr. Buonauro, and in the presence of third parties I was informed that I had thirty (30) days or until February 27, 1978 in which to file a Petition for Writ of Certiorari to the Supreme Court and that I had plenty of time in which to do so but that it had to be done before the end of the thirty (30) day period.

Trusting the advice of my counsel I sought out the representation of attorney J. RUSSELL HORNSBY and JAMES M. CAMPBELL for the preparation of Petition for Writ of Certiorari wherein I was informed on Monday, February 20, 1978 that the thirty (30) day time period for filing Petition for Writ of Certiorari had elapsed approximately forty (40) days ago and it would necessitate a Motion for Leave to Submit Petition for Writ of Certiorari out of time and that that is the purpose of this Affidavit. At all times I trusted and relied on the advice of my attorney Mr. Buonauro, and that I had thirty (30) days from the Issuance of the Order Denying the Motion for Issuance of Stay of the Mandate in which to file my Petition for Writ of Certiorari.

FURTHER AFFIANT SAYETH NOT.

/s/ ANTHONY J. LEVATINO

Sworn to and subscribed before me
this 21 day of February, 1978.

/s/ HARRIET E. FORTUNE
Notary Public — State of Florida

[SEAL]